PUBLIC FINANCE BERHAD

v.

JETFAST SDN. BHD.

HIGH COURT MALAYA, IPOH
TUAN KANG HWEE GEE JC
[ORIGINATING SUMMONS NOS: 24-827-94, 24-828-94, 24-830-94, 24-831-94, 24-832-94, 24-833-94, 24-1015-94]
1 APRIL 1995

LAND LAW*: Section 327(1) NLC - Removal of private caveats entered by defendants on land charged by housing developer to plaintiff bank - Whether plaintiff aggrieved person - Whether defendants/purchasers have a caveatable interest - Sale agreements not complying with reg. 11 of the Housing Developers (Control and Licensing) Regulations 1989 - Whether agreements invalidated - Whether defendants have any cause of action against the plaintiff - Whether there was a serious question to be tried - Priorities of interest.*

WORDS & PHRASES*: "Person or body aggrieved".*

All the eight defendants caveated their respective lots of land which were charged to the plaintiff bank together with other lots by the developer, the registered proprietor, as security for a loan. The charge was registered on 16 August 1977. The loan still outstanding from the developer to the plaintiff was RM55,000 which the developer was unable to settle as the plaintiff insisted that repayment should be made not only for the present charge but also the outstanding loan in respect of another charge. The plaintiff applied to remove the caveats.

At the hearing, the Court proceeded to hear only originating summons nos. 828 and 832 as the facts and law in all the originating summons were almost identical and the defendants agreed to be bound by the decision of the Court with regards to the same.

The defendants in the two summons had entered into an agreement to purchase the said lots on 12 June 1992 and 10 February 1992 and contended that as *bona fide* purchasers for value of the lots from the developer they had a caveatable interest which should be protected until the discharge of charge and the transfer of the lots to them. The plaintiff submitted that they were an aggrieved person within the meaning of s. 327 of the National Land Code (NLC) and questioned the validity of the sale agreements as the format used was not in compliance with reg. 11 of the Housing Developers (Control and Licensing) Regulations 1989 (the Regulations) and further, the defendants had failed to exhibit evidence of consideration for the purchase of the lots.

Held:

[1] The words "person or body aggrieved" in s. 327 convey no more than the ordinary meaning of a person who is affected by the lodgement of the caveat. Had the legislation intended a narrower meaning it would have provided otherwise.

[2] The plaintiff in the present cases is an aggrieved person. At the time the land was charged to the plaintiff it was free of encumbrances. As registered chargees they hold an interest *in rem* in the property and have every right to protect against any intrusion on the interest. They are entitled to their right to foreclose and have the land sold off unencumbered in the event of the non payment of the loan by the chargor under s. 254 of the National Land Code. Any caveat entered on the land would intrude into their interest as it has the effect of making that interest less marketable thereby reducing its value.

[3] It is clear that the sales and purchase agreement with the developer constitutes in each case a contract which confers on the purchasers defendants a registrable interest in land (that is to say a right *in personam* against the developer which would in due course convert into a right *in rem* upon registration of transfer and with it the right to caveat under s. 323(1)(a). In the event the defendants do have a caveatable interest in the said lots.

[4] The failure to use the formatted sales and purchase form of agreement does not operate to invalidate any agreement entered into with the purchasers but merely exposes the developer to a penalty under the Regulations.

[5] There is a serious question to be tried with regard to the defendants' right to the lots they had purchased. But that question only arises as between the defendants and the developer and not between the defendants and the plaintiff. The plaintiff is not bound by any contract with the defendants nor were they privy to any agreement between the defendants and the developer. But even assuming that the plaintiff had in fact willfully and wrongly refused to discharge the charges of the lots to the developer as alleged, the defendants would not have any cause of action against the plaintiff. Their only recourse lies with the developers with whom they have privity. As between the plaintiff and the defendants, there is clearly no serious question to be tried.

[6] The charge which confers the plaintiff with indefeasibility was registered way back in 1977 whereas the purported sale of the two lots were made only in June, 1992. Clearly in the present summons the plaintiff's interest has priority and the caveats should therefore be removed.

[Application allowed]

Cases referred to:
United Malayan Banking Corporation Bhd. v. Development and Commercial Bank (Ltd.) Bhd. [1983] 1 MLJ 165 ***(refd)***
R.A.P. Nathan v. Haji Abdul Rahman bin Haji Yusoff & Ors. [1980] 1 MLJ 248 ***(cit)***
Eng Mee Yong & Ors. v. Letchumanan [1979] 2 MLJ 212 ***(foll)***
Toh Kian Hin v. Ting Ding Woi & Anor. [1987] 1 MLJ 40 ***(foll)***
Hew Sook Ying v. Hiw Tin Hee [1992] 2 SCR 257 ***(cit)***
Malayan United Finance Bhd. v. Tan Lay Soon [1991] 1 MLJ 504 ***(foll)***
Eng Ah Mooi & Ors. v. Overseas Chinese Banking Corp. 1983 1 MLJ 209 ***(not foll)***

Legislation referred to:
National Land Code 1965, ss. 254, 323(1)(a), 327(1), 340
Housing Developers (Control and Licensing) Regulations 1989, reg. 11

Other source referred to:
New Webster Dictionary of the English Language

For the plaintiff - K.L. Low; M/s. Soo Thien Ming & Shahrizat, K.L.
(O/S Nos. 829, 832, 833 & 1015)
For the defendants - Gurbachan Singh; M/s. Bachan & Kartar, Ipoh
(O/S Nos. 827, 828 & 830)
For the defendants - Kerpal Singh; M/s. U. Harcharan & Kerpal, Ipoh

JUDGMENT

Kang Hwee Gee JC:

Background:

By these originating summons the plaintiff is seeking to remove caveats entered by the respective defendant on the lots of land which they had purchased from Hock Seng Housing Development Sdn. Bhd., a housing developer.

The defendants in originating summons 827, 828 and 830 were represented by Encik Kerpal Singh and those in originating summons 829, 832, 833 and 1015 by Encik Gurbachan Singh. In the hearing before me the parties agreed that as the facts relied by them and the law in all the originating summons are identical (save for differences in considerations, dates of agreements and entry of caveats) in order to save time the Court should hear only originating summons 828 and originating summons 832 together. They agreed that my decision in the two summons should bind the rest. Further, Encik Kerpal Singh intimated that he would not be making any submission and would adopt the submission of Encik Gurbachan Singh.

Originating summons 828 is an application by the plaintiff under s. 327(1) of the National Land Code 1965, to remove a private caveat No. 5489/92 Jilid 834 Folio 28 lodged by the defendant Jetfast Sdn. Bhd., on land H.S.(D) KA 3250/75 Lot 66581 Mukim Kampar on 8 November 1992.

Originating summons 832 is a similar application in respect of private caveat No. 3626/92 Jilid 815 Folio 65 lodged by Gurbachan Singh a/1 Bagawan Singh an advocate and solicitor who is himself the defendant, on land H.S. (D)KA 3256/75 Lot 66587 Mukim Kampar on 15 July 1992.

The difference between originating summons 828 and originating summons 832 appears to be the consideration applied by the defendants to the purchase price of the respective lots. In originating summons 828 the purchase was for a cash consideration (*vide* the sales and purchase agreement OKE 1 in defendant's affidavit, encl. 4), whereas in originating summons 832 the purchase was by way of set off against the services rendered to the developer by the defendant as their advocate and solicitor (*vide* sales and purchase agreement GS1 in defendant's affidavit encl. 3).

The following facts are undisputed:

The lots of land which were caveated by the defendants were charged to the plaintiff bank on 13 August 1977 together with other lots by the developer, the registered proprietor, as security for a loan. The charge was registered on 16 August 1977 *vide* Presentation No. 7727/77 Jilid 635 Folio 36.

In respect of the present charge the loan still outstanding from the developer to the plaintiff was only RM55,000 (see GS3 in defendant's affidavit in reply encl. 3 in O.S. 832). Sometime in 1989 the plaintiff (presumably acting under the term of the loan agreements annexed to the charges) had applied by originating summons 24-257-89, to consolidate the loan in respect of the charge with the loan secured by another charge on another property of the developer, the effect of which would make the developer liable to repay back both the loans

before they could obtain a discharge of the charge in respect of the present lots of property. The application was dismissed by the High Court on 19 January 1991 and the decision was confirmed on appeal to the Supreme Court (see GS7 and GS8 encl. 3 in O.S. 832).

The developer had made attempts to settle their outstanding loan of only RM55,000 in respect of the outstanding lots (including the present lots purchased by the defendants) which still remain charged to the plaintiff. The plaintiff refused to accept the developer's tender of payment insisting that the developer should settle not only the sums due in respect of the present charge but also the outstanding loan in respect of the other charge on other lands mentioned earlier.

Plaintiff's Case:

The affidavits in support of the application sworn by the manager of the plaintiff bank at Kampar, Yap Choon Huat state 4 common grounds why the caveats lodged by the defendant in the two summons should not be allowed to remain, but before me plaintiff Counsel Encik K.L. Low proceeded only with the following 3 grounds:

1. The charge in favour of the plaintiff had been registered since 16 August 1977 and the defendant was aware of the plaintiff's interest in the said land. The defendants in the two summons only entered into the agreement to purchase the said lot on 12 June 1992 and 10 February 1992. The plaintiff's interest therefore takes priority over both the defendants' interest.

2. The defendants had no caveatable interest in the said land.

3. The defendants did not take any step which they should take to prosecute their claim.

Defendant's Case:

From the affidavits in opposition of the defendant company director Ong Kui Eng in originating summons 828 (encl. 4) and the defendant Encik Gurbachan Singh in originating summons 832 (encl. 3), it is clear that their opposition to the plaintiff's application is on the common ground that as *bona fide* purchasers for value of the lots from the developer they have a caveatable interest which should be protected until such time that the charges are redeemed and transferred to them.

It was clear, they contend, from the refusal of the Court to allow consolidation of the two loans that the developer had the legal right to redeem the charged lots by paying the outstanding loan of RM55,000 and obtain the discharge of charge of the lots thereby enabling the lots to be transferred to them. In the event, the defendants contend, their caveats should be allowed to remain to maintain the status quo until such time that the charged lots are discharged. According to Encik Gurbachan the developer had already commenced proceedings seeking a declaration that they are entitled to redeem the lots and the application is pending before the Court, although nowhere was this stated in the defendants' affidavit. The balance of convenience, he submitted, leans in favour of preserving the caveats.

Basic Issues:

Before I proceed to consider the substance of the plaintiff's application two basic issues raised by the parties need to be settled *viz.*,

A) whether in the first place the plaintiff is an aggrieved person within the meaning of s. 327 of the National Land Code failing which they would not have the right to apply for the removal of the caveats and,

B) whether the defendants in fact have caveatable interest failing which the defendants would not have the right to caveat the lots under s. 323(1)(a) of the National Land Code.

The first issue requires careful deliberation. In his affidavits in support in both the cases the plaintiff's manager Yap Choon Huat contends that the existence of the caveats hinders and causes hardship to the plaintiff in the exercise of their right of sale of the lots which Counsel for the plaintiff submitted therefore made the plaintiff an aggrieved person. On the other hand Encik Gurbachan argued that the plaintiff could only become an aggrieved person if they had commenced foreclosure proceedings which they had not in these cases. No authority nor any persuasive reasoning was however, submitted for this proposition.

Who Then in Law is a "Person or Body Aggrieved"?

The dictionary meaning of "aggrieved" means "to give pain or sorrow"; to grieve; to bear hard upon; to oppress or injure in one's rights." (*New Webster Dictionary of the English Language*). The words "person or body aggrieved" in s. 327 therefore in my view, convey no more than the ordinary meaning of a person who is affected by the lodgement of the caveat. Had the legislature intended a narrower meaning it would have provided otherwise.

However, in *United Malayan Banking Corporation Bhd. v. Development and Commercial Bank (Ltd.) Bhd.* [1983] 1 MLJ 165 the former Federal Court appears to have given the term some legal significance. It was held that an offer by a third party to buy the land which was charged to the respondent was sufficient to make the respondent chargee an aggrieved person to apply for the removal of the caveat entered by the appellant. But the Court in that case did not define the scope of grievance that must be established before a person or body can be considered aggrieved thus leaving the categories open.

The Federal Court in that case also did not disapprove of the wide test applied in *R.A.P. Nathan v. Haji Abdul Rahman bin Haji Yusoff & Ors.* [1980] 1 MLJ 248, 250 referred to in the appeal, which applied the simple test of whether the applicant "will suffer loss if the caveat lodged by the plaintiff was not removed." In that case the applicant was a previous proprietor of the land that was caveated and his interest when he applied for the removal was only in a joint venture housing agreement he entered into with the new proprietor in which he would be deriving some benefits. It was held (Syed Agil Barakbah J) that:

> In the circumstances, as the facts present, the third defendant (the applicant) falls within the meaning of a person aggrieved by the existence of the caveat under s. 327(1) and may apply to the Court for an order of its removal by an *ex parte* application.

I am of the considered view that the plaintiff in the present cases in an aggrieved person. At the time the land was charged to the plaintiff it was free of encumbrances. As registered chargees they hold an interest *in rem* in the property and have every right to protect against intrusion on the interest. They are entitled to their right to foreclose and have the land sold off unencumbered in the event of the non payment of the loan by the chargor under s. 254 of the National Land Code. Any caveat entered on the land would intrude into their interest as it has the effect of making that interest less marketable thereby reducing its value.

On the second issue raised by the plaintiff that the defendants did not have caveatable interest in the land they caveated, their case rests not on the legality of the interests but on the integrity of the sales and purchase agreements (OKE1 in encl. 4 in originating summons 828 and GS1 in encl. 3 in originating summons 832). The agreements, it was contended, expose two inconsistencies thereby affording grounds to doubt the *bona fide* of the sales.

a The first was that the forms of the sales and purchase agreement used in the transactions were not in the format prescribed under reg. 11 of the Housing Developers (Control and Licensing) Regulations 1989, and in fact different from the format used in respect of other sales to other purchasers which complied with the format prescribed. There was therefore plaintiff's Counsel submitted, a reason to doubt the *bona fide* of the sales in which case there could be no caveatable interests in favour of the defendants.

b It is clear to me that the failure to use the formatted sales and purchase form of agreement does not operate to invalidate any agreement entered into with the purchasers, but merely exposes the developer to a penalty under the Regulations. In the absence of any further evidence why the parties chose not to use the prescribed format, such non compliance is in my view insufficient to enable me to find the sales of the lots non *bona fide*.

c The second was the failure of the defendants to exhibit any evidence of the consideration in the purchase of the lots by the defendants. In originating summons 828 the consideration for the purchase was for the sum of RM45,000 in which only the sum of RM5,000 had been paid with the balance to be paid after the delivery of the unencumbered issue document of title. In originating summons 832 the consideration was by way of set off against legal fees payable to the defendant as the developer's lawyer. I fail to see how the failure of the d defendants to exhibit evidence of the consideration could affect the *bona fide* of the sales. In both the cases the consideration was stated and acknowledged by the parties in the respective agreement.

Under s. 323(1)(a) of the National Land Code a private caveat may be entered by:

> any person or body claiming title to, or any registerable interest in, any alienated land or e any right to such title or interest.

It is clear that the sales and purchase agreement with the developer constitutes in each case a contract which confers on the purchaser defendant a registerable interest in land (that is to say a right *in personam* against the developer which would in due course convert into a right *in rem* upon registration of transfer) and with it the right to caveat under s. 323(1)(a). In the event I am bound to hold that the defendants do have caveatable interest in the said f lots.

Issues Following:

Having decided on the primary issues I will now have to examine plaintiff's applications in accordance with the established principles enunciated in the oft cited case of *Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 212, (at p. 215B) where it was held that in an application g by the caveatee under s. 327 for the removal of the caveat, the caveator:

> ...must first satisfy the Court that on the evidence presented to it his claim to an interest in property does raise a serious question to be tried; and having done so, he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

h It would appear from the submission of Encik Gurbachan Singh on the first limb of the *dictum*, all that the caveators need to show is that they have a serious question to be tried as against the developer Hock Seng Housing Development Sdn. Bhd. For its clarity and brevity however, *Eng Mee Yong* (*supra*) does not state in clear terms whether by the phrase 'the serious question to be tried' is meant only question that arises strictly as between the caveator and i caveatee or extends to all questions affecting the caveator's claim in respect of his interest

in the land against other persons such as the developer in the present summons, although in the context of that case it could be implied to mean the former. However, this question was decided by the Sibu High Court by Chong Siew Fai, J as he then was, in *Toh Kian Hin v. Ting Ding Woi & Anor.* [1987] 1 MLJ 40, which clearly restricts such questions only against the caveator, a decision which I am in total agreement with.

In that case it was held that the plaintiff, a *bona fide* purchaser of land from a "beneficiary" who had obtained a fraudulent transfer of the land from the defendants' brother, was entitled to have the defendants' caveat removed under s. 327, there being no serious question to be tried as against the plaintiff. Although the defendants had alleged fraud and other matters against the brother and the beneficiary it was held that they are "separate and distinct and have no connection with and ought not to be imputed on the plaintiff".

There could be no doubt in the present summons the agreements imposed upon the developer an obligation to deliver the lots free from encumbrance to the defendants, which means that they would have to obtain discharge of the charges from the plaintiff before the lots could be transferred to the defendants. The developer's failure to do so could no doubt lead to a breach of the sales and purchase agreements. I have therefore no reason to disagree with Encik Bachan Singh that there is a serious question to be tried with regard to the defendants' right to the lots they had purchased. But that question only arises as between the defendants and the developer and not between the defendants and the plaintiff. The plaintiff is not bound by any contract with the defendants nor were they privy to any agreement between the defendants and the developer. It is not disputed by the plaintiff that the sums still owed by the developer in respect of the charge was only some RM55,000 which could have been discharged had the plaintiff not insisted on the consolidation of the loans. But even assuming that the plaintiff had in fact willfully and wrongly refused to discharge the charges of the lots to the developer as alleged, the defendants would not have any cause of action against the plaintiff. Their only recourse lies with the developer with whom they have privity. As between the plaintiff and the defendants, there is clearly no serious question to be tried.

Having found the first prerequisite absent it follows that the caveats should not be allowed to remain. I need not therefore, proceed to the next step of determining the balance of convenience of the parties. Neither do I need to consider the third point raised by the plaintiff on the defendant's failure to timeously prosecute their claim after having lodged the caveats as decided in the Supreme Court case of *Hew Sook Ying v. Hiw Tin Hee* [1992] 2 SCR 257 cited by plaintiff's Counsel. But if a ruling is required I would state that this requirement would not apply in the present situation. The sales of the lots were subject to the discharge of the charge and the lodgement of the caveats by the defendants were made with the intention of protecting their interests pending the settlement of the outstanding loan in respect of the charge by the developer to the plaintiff after which the lots could then be transferred to the defendants. It is clear from the defendants' affidavits the impediment to the completion of the sales lies with the plaintiff who had rejected the developer's tender of payment to discharge the charge. Until the developer refuses to perform his part of the bargain to transfer the lots to the defendants after discharging the charge there is no cause of action against the developer.

Indefeasibility and Priority of the Plaintiff's Interest:

The mainstay of the plaintiff's case rests not on the principle in *Eng Mee Yong* (*supra*) but on the principle of indefeasibility and priority as enunciated in the Supreme Court case of *Malayan United Finance Bhd. v. Tan Lay Soon* [1991] 1 MLJ 504, which Encik K.L. Low canvassed in earnest before me. In considering whether the caveats should be allowed to

remain as against the plaintiff chargee who has in fact acquired indefeasibility under s. 340 of the National Land Code by reason of the charge having been registered, it would appear from that case that the same decision could be pronounced in favour of the plaintiff. Assuming that I am wrong in my ruling that there was no serious question to be tried between the plaintiff caveatee and the defendants caveators in the present summons, the plaintiff should in my view be allowed to succeed on this ground alone.

In that case the appellants were chargees of certain lands in Penang. The respondent had lodged two caveats on the lands which was based on a purported agreement by the registered proprietor to sell the lands to him. The respondent's proposition that as against the chargee he has a statutory right of discharge of the charge under the National Land Code or the equitable right of redemption similar to the right of a mortgagor in English law (as decided in the earlier Federal Court case of *Eng Ah Mooi & Ors. v. Overseas Chinese Banking Corp.* [1983] 1 MLJ 209) was rejected. That right, it was held, vested not in the caveator but in the chargor who alone could exercise it. It was held that the chargee had an indefeasible right and priority as against the respondent caveator by virtue of the registration of the charge which was made some 5 years before the caveats were lodged and therefore the caveats should be removed.

The facts in *Malayan United Finance Bhd.* appear to be almost on all fours with the facts in the present summons and in my view the same law could be applied. The charge which confers the plaintiff with indefeasibility was registered way back in 1977 whereas the purported sales of the two lots were made only in June 1992. Clearly in the present summons the plaintiff's interest has priority and the caveats should therefore be removed.

As agreed between the parties, the same order should apply with regard to the other originating summons.